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# LEARNING ABOUT JUDICIAL INDEPENDENCE: INSTITUTIONAL CHANGE IN THE STATE COURTS

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**ABSTRACT:** There is widespread agreement that legal institutions—independent courts in particular—are crucial to the growth of a nation. Yet systematic analysis of the factors that underlie the development of legal institutions is difficult, because most institutions change very seldom. In this analysis, I examine a legal institution that offers substantial cross-sectional and time series variation to explore: the procedures used to select and retain judges in the American states. Five different procedures emerged at different points in time over the nation's history, and all are in use today. I conclude as follows: Each new procedure was developed in attempt to increase the independence of state judges from incumbent officials and political parties, and was then superceded by a newer procedure, due in large part to unanticipated agency problems. However, not all existing states changed procedures when the opportunity arose. State's with larger legislative majorities were less likely to do so, consistent with the hypothesis that a stronger hold on power reduces the attractiveness of an independent court to incumbent politicians. More recent entrants to the Union were more likely to do so, consistent with the hypothesis that newer institutions are less costly to alter. Finally, the fact that judicial selection and retention procedures are written into state constitutions appears to have been a barrier to change: Where state constitutions did not have to be amended, or were being re-written anyway, states were much more likely to adopt new procedures.

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## *I. INTRODUCTION*

Five distinct procedures to select and retain judges are used in the American states today: two forms of election (partisan and nonpartisan), two forms of appointment (gubernatorial and legislative), and one appointment/election hybrid (the merit plan).[1] Particular procedures—with particular effects on the independence of state judges—have predominated during different periods of the country's history.[2] For the first fifty years after the American Revolution, legislative and gubernatorial appointment were the norm. Beginning in the mid-19th century, partisan judicial elections became the preferred procedure for both new and existing states. Nonpartisan judicial elections were introduced in the early 20th century, replacing partisan elections as the favored method. Since then, nonpartisan elections have been largely superceded by the merit plan, which has been the procedure of choice for court reformers over the last half-century.

What explains this repeated pattern of innovation, predominance, and replacement? I conclude as follows: The roots of each institutional change lay in an evolving understanding of the appropriate role for the judiciary, and of the appropriate judicial institutions for supporting

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[1]Partisan elections involve judges running for the bench on partisan tickets along with other candidates for public office. Nonpartisan elections prevent judicial candidates from revealing party affiliation (the elections are sometimes held separately from other public elections). The merit plan involves the appointment of a candidate by the governor from a shortlist of (typically three) candidates put together by a nonpartisan nominating commission; the chosen candidate then stands for subsequent terms in uncontested retention elections. For more detail on these procedures, see section III.

[2]For discussions of the effects of different procedures on judicial independence, see, for example, Nagel (1973), Elder (1987), Hall (1987), Hall and Brace (1996), Hanssen (1999, 2000), Tabarrok and Helland (1999), and Besley and Payne (2003), all of which are reviewed in more detail in the section II. Landes and Posner (1975, 875) define an independent judiciary as "one that does not make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body." Ferejohn (1999, 365) writes, "Understood traditionally, judicial independence concerns independence of judges from the interference of other governmental officials."

that role. Of central importance were beliefs about the relevant agency problems—between citizens and their representatives and between citizens and judges—which in turn underlay conceptions as to how the judiciary should be structured. As the actual working of given judicial institutions became apparent, estimates of the losses from particular agency problems were altered in ways that implied corresponding changes to the institutions.

That said, not all states changed selection and retention procedures with each round of reform. State's with larger legislative majorities were less likely to do so, consistent with the hypothesis that a stronger hold on power reduces the attractiveness of an independent court. States that had joined the Union more recently were more likely to adopt new procedures, consistent with the hypothesis that less firmly entrenched institutions are less costly to alter. The importance of the potential administrative burden is also apparent—judicial selection and retention procedures are written into state constitutions, which are costly to amend. Where amendments were not necessary, or where constitutions were being re-written anyway, new procedures were more likely to be adopted.

The changes in state judicial selection and retention procedures investigated here have been widely noted but subjected to little systematic analysis.[3] For the most part, scholars have explained the various changes with simple reference to larger political movements, which somehow just carried judicial institutions along with them—"responding to popular ideas at different historical periods," as one account puts it (Glick and Vines 1973, 40).[4] Typical is the influential legal historian James Willard Hurst (1950, 140), who writes that the emergence of a

[3]An exception is Epstein, Knight, and Shvetsona (2002), who construct a theory of institutional change that takes notions of political competition into account.

[4]An exception is Hall (1983).

given procedure was "based on emotion rather than on a deliberative evaluation of experience." The evidence presented here indicates that the process was much more rational and goal-oriented than such portrayals suggest.

## *II. BACKGROUND: JUDICIAL INSTITUTIONS IN THE AMERICAN STATES*

Scholars have shown that different state judicial selection and retention procedures are associated with different outcomes in a variety of dimensions. Nagel (1973) concludes that partisan elected judges decide cases in a more partisan fashion than appointed judges. Elder's (1987) state-level estimates suggest that fewer criminal cases went to trial rather than ending with guilty pleas where judges were elected. Hall (1987), in a case study of Louisiana's partisan elected supreme court, concludes that electoral incentives discourage justices from dissenting on highly controversial issues. Hall and Brace (1996), in an eight state analysis, find that partisan elected justices are more likely to accept than to overturn death sentences for a given partisan affiliation (they attribute this to susceptibility to electoral pressure). Tabarrok and Helland (1999) find that partisan judicial elections are associated with higher tort awards on average, and in particular in decisions against out-of-state businesses. Hanssen (1999) concludes that appointed courts (including merit plan judges, who are initially appointed) are more likely to side with challengers to regulatory status quos, ceteris paribus. Hanssen (2000) finds evidence consistent with the hypothesis that state administrative agencies make greater efforts to protect themselves from reversal when facing appointed courts. Besley and Payne (2003) find fewer employment discrimination filings per capita in states where judges are appointed.[5]

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[5]The evidence as to whether different procedures lead to the selection of judges with different characteristics (education, race, religion, sex, previous career) is fairly inconclusive. See, e.g., Canon (1972), Flango and Ducat (1979), Glick and Emmert (1987), and Alozie (1990).

This evidence that selection and retention procedures have measurable effects on judicial behavior renders the systematic changes in procedures over time intriguing. Figure 1 lists the proportion of states using each procedure by decade from 1790 until 1990.[6] For the first fifty years of this country's history, all states appointed their judges, delegating that task to either the legislature or the governor (in fact, appointment developed into a joint affair, with one party nominating and the other confirming). New York became the first state to use partisan judicial elections to select its high court justices in 1847, and by the early 20th century, 80 percent of all states were doing so. North Dakota became the first state to employ nonpartisan elections for its high court justices in 1910, and by the mid-20th century, more than one-third of all states were choosing their justices that way. California and Missouri became the first states to implement variants of the merit plan; Kansas followed in 1958 and by 1990, 28 percent of all states had adopted the full merit plan and another 14 percent used one or the other of the plan's two central features (a nominating commission and retention elections).[7]

The predominance of one single method during each of these periods is further illustrated by figures 2 and 3. As figure 2 shows, between 1789 and 1847, all 13 of the original states and all of the next 16 states to join the Union enacted either legislative or gubernatorial appointment. Between 1847 and 1910, 20 of the 29 then-existing states switched to, and all 17 states that

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[6]In all that follows, I refer to the selection and retention procedures used in the state's highest court. In most cases, the methods used in the lower courts are the same, but the date of enactment might differ. The sources for the information are varied, including most notably Haynes (1944) for early years and *The Book of the States* for more recent years. However, I have also sought independent confirmation from original sources where possible, including from the constitutions published in Thorpe (1909); from state government web sites; and through consultation with researchers in state law libraries.

[7]In the figures, I group states that use either or both of these features under the "merit plan" heading. For more detailed state-specific information, see table 1.

joined the Union adopted, partisan judicial elections. Between 1910 and 1958, 17 of 46 existing states switched to, and one of the two new states to join the Union (Arizona) adopted, nonpartisan judicial elections.[8] Finally, 21 of the 48 then-existing states had switched to the merit plan by 1990, and both new states (Alaska and Hawaii) chose to employ the merit plan.

Figure 3 includes only pre-existing states; i.e., those that had already joined the Union and thus were employing another method when a new procedure emerged. Between 1847 and 1910, roughly two-thirds of all existing states switched judicial selection procedures, with nearly 80 percent of switching states choosing partisan elections.[9] Between 1910 and 1958, 38 percent of existing states switched selection methods, with 90 percent of them choosing nonpartisan elections. And between 1958 and 1990, fifty percent of all states switched judicial selection procedures, 84 percent choosing the merit plan.

In short, there are four distinct periods: the appointment period, running from the birth of the nation until the mid-19th century; the partisan election period, running from the mid-19th century until the early 20th century; the nonpartisan election period, running from the early 20th

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[8]I date the end of the nonpartisan election period as 1958 rather than either as 1934 (when California first employed a merit plan hybrid) or 1940 (when Missouri enacted the whole plan). The reason is that during the 1940s and early 1950s, nonpartisan judicial elections remained the most popular of the selection methods. If the nonpartisan period is instead said to end in 1934, the number of existing states switching to nonpartisan judicial elections would be 13 rather than 17.

[9]The exceptions all involve former Confederate states in the years following the Civil War. The 14 non-Confederate states that changed judicial selection methods in the 19th century all did so in the 1840s and 1850s, and every single one chose partisan elections. By contrast, there were a series of major post-Civil War shifts in judicial selection procedures (from appointment to election to appointment and back to election again) in the ex-Confederate states, each corresponding to a new round of post-Civil War constitution writing. Friedman (1985, 352) posits that the repeated redesign of state constitutions in the period following the Civil War was driven by an obsession with maintaining white supremacy. Of particular concern was the judiciary; hence the frequent changes in procedure as political control in the other branches shifted (see Hall 1984b).

century until the mid-20th century; and the merit plan period, running from the mid-20th century until today. Table 1 lists the procedures used by state during each period.

*III. THE HISTORY OF JUDICIAL PROCEDURES: CHANGING AGENCY PROBLEMS*

In what follows, I will investigate the history behind the emergence and subsequent fall from favor of each of these judicial selection and retention procedures. I will make the following argument: The process was driven largely by changes in the relevant agency problems, or at least in how those agency problems were perceived. To briefly summarize: In the nation's early years, state legislators (the heroes of the American Revolution) were regarded as more reliable representatives of "the people" than were state judges (colonial judges had been faithful servants of the English Crown). As a result, the first state constitutions made courts highly accountable to legislatures. As time passed, however, it became apparent that legislators did not always act in the public interest, and the need for an effective third-party enforcer (to ensure legislative adherence to constitutional and statutory guarantees) became increasingly clear. The state judiciary was the logical (perhaps only) candidate to play that role. However, this in turn required reducing the ability of legislators to influence judicial decisions; i.e., increasing the independence of state judges. That said, reformers did not initially seek to do so by insulating judges from direct political pressure—as is done today at the federal level—but rather by giving judges a power base of their own, through popular elections. The expectation was that state judges, acting as the voters' "good" agents, would keep the "bad" agents in the other branches in check. But voters proved no better at monitoring judges than they had at monitoring legislators—partisan judicial elections led to the capture of state judges by party machines. Emphasis therefore turned to identifying ways of insulating judges from political influence. The

last two procedures—nonpartisan elections and the merit plan—reflect that emphasis, although each attacked the problem in ways consonant with the political developments of their time.

I turn now to the historical detail.

A. Setting the Stage: Legislative and Gubernatorial Appointment, 1790-1847

The institutions of judicial selection in the years immediately following the Revolution put state courts very much under the thumb of state legislatures.[10] The legislature enjoyed the exclusive right to choose judges in six states, shared those rights with the governor in seven others (usually in the form of confirmation powers), and exercised substantial control over whether or not judges remained on the bench everywhere, both through the reappointment decision (many state judges served terms defined by "good behavior," which further increased legislative discretion) and through impeachment and related practices. And legislatures weren't hesitant to use this influence. In late 18th century Rhode Island, supreme court justices who nullified a legislative act were called before the legislature to explain themselves, and were replaced by the legislature when their terms expired the following year (Rhode Island justices at the time served one year terms; see Carpenter 1918, 17-19). In Delaware, removal of judges by joint address was introduced early in the 19th century to supplement impeachment, which was felt insufficient to the needs of the legislature to control the courts (Ziskind 1969, 139). In Pennsylvania, where the governor appointed members of the judiciary initially, judges could be removed from office by a two-thirds vote of the legislature affirming that there was a

[10]Kaufman (1980, 683) writes, "After 1776, the states adopted constitutions replete with checks against executive control of the judiciary. Remarkably, however, the state constitutions contained little or no regulation of the legislative power. Under most state constitutions, the legislature was established as the dominant force in government and played a central role in the appointment and removal of judges."

"reasonable cause," although that cause did not need to be sufficient to justify impeachment (Ziskind 1969, 141). Indeed, Pennsylvania's Republicans made the removal of "obnoxious" judges party policy (Horwitz 1977, 253). And the Massachusetts supreme court was required to render opinions at the command of the governor or the legislature (Hall 1983, 348).[11]

The substantial powers exercised by state legislatures over courts were largely the result of two factors: the lack of a clearly distinct judicial role, and an ingrained distrust of colonial judges. First, there was a substantial mixing of legislative, executive, and judicial duties during the colonial period, and in the first decades following the Revolution. For example, the colonial legislature was typically the court of final appeal, often with the governor sitting as chancellor.[12] There was a scarcity of trained lawyers in colonial America; even where separate courts sat, the judging was carried out primarily by prominent citizens (Auman 1940, 42; Friedman 1985, 126; Glick and Vines 1973, 19). After the Revolution, autonomous courts of appeal developed only gradually. In Connecticut, for example, the governor, assistant governor, and legislature sat together on the Supreme Court of Errors, while in many other states, the function was filled by the legislature alone (Pound 1940, 95). In fact, Georgia did not even create a supreme court until 1848 (Auman 1940, 156). In short, to early Americans, lawmaking and judging were not the essentially distinct activities they would become.

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[11]See Ziskind (1969) for additional examples in the same vein.

[12]This corresponded to English practice (e.g., the "High Court of Parliament"—see Hall 1989, 17). Indeed, the mixing goes back to ancient times—ancient kings (Solomon, for example) were judges as well as rulers. That said, colonial legislation was reviewed to ensure that it did not contradict English law. While that review was at first exercised only by King in Council, or by the Crown's local governor, it was increasingly delegated to the colonial courts as time passed (see Kaufman 1980, 680). And this was a source of tension—the dependence of colonial judges on the Crown generated such unhappiness that it is mentioned in the Declaration of Independence.

Second, the country emerged from the colonial period with a deep distrust of the executive and of the judiciary. Both had been faithful agents of the crown—colonial governors were appointed by the King, and in turn appointed colonial judges, who served at the King's pleasure. By contrast, colonial legislatures had been the source of the successful opposition to the Crown, and were correspondingly popular. Furthermore, the legislature was considered to be the most direct expression of the popular voice. As a result, the powers granted the legislature by early state constitutions were vast.[13] Auman (1940, 159-60) writes, "[O]ur first state governments were largely characterized by legislative supremacy. In that early period, the popular will was considered omnipotent and the legislature was looked upon as the chief organ of that popular will." Given the low esteem in which colonial courts were held, and the high esteem in which legislatures were held, the idea of a strong and independent state judiciary overseeing legislative activity was laughable when the first state constitutions were drafted.[14] Powerful courts could infringe on the will of the people—judicial review of legislative acts, when it did occur, was generally regarded as an unreasonable usurpation of legislative power, and thus of the public will.[15] Instead, state courts were made subservient to state legislatures.

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[13]In New Jersey, for example, the legislature even had the right to appoint the governor, who also served as chancellor in the then-standard mixing of judicial and executive duties. See Ziskind (1969, 140).

[14]Dodd (1928, 81) writes, "The most important power acquired by the judicial department in the American states has been that of declaring invalid laws that, in the opinion of the judges, conflict with the Constitution. The exercise of this power was not contemplated by the earlier state constitutions. In the earlier state governments the courts really occupied a subordinate position." In the first two decades of the country's history, less than a dozen legislative measures were struck down by state courts (Hall 1989, 64).

[15]For example, when the doctrine of judicial review was first asserted in North Carolina in 1787, the justices were denounced as usurpers of power (Carpenter 1918, 20).

In sum, the judicial institution established at the state level in the aftermath of the Revolution reflected both past experience and expectations about the court's future role. The Revolution left the states with governments dominated by their legislatures—legislatures had been the heroes of the Revolution and were believed to be the authentic expression of the public voice. By contrast, judges had been agents of the British Crown. Furthermore, there was little in the colonial experience to lead citizens to expect a distinct "judicial branch" in any case, much less one that would act as a check on the activities of the other branches of government. Judicial institutions were therefore structured so as to make courts significantly subordinate to elected politicians.

B. The First Change: Partisan Judicial Elections circa 1850

Public support for state governments dominated by their legislatures eroded as the 19th century progressed. The first part of that century had seen a burst of legislative activity as states vied with each other to develop economically, their legislatures providing direct financial support, underwriting loans, granting tax exemptions, and so forth (Friedman 1985, 177-8; Hurst 1950, 82; Scheiber, 1978; 1982). Increasingly, these came to be perceived as special favors, and charges that legislatures spread these favors unevenly abounded. Legislatures were also held responsible for debts and deficits incurred in the 1830s and 1840s through such things as investment in railroad, highway, and canal stock. Aumann (1940, 161) writes, "A growing dissatisfaction with legislative performance hastened a shift of power." Hall (1989, 89) writes, "The populist and antigovernmental stirrings of the late 1840s and 1850s climaxed in an outburst of constitutional reform that diminished legislative power." Increasing restrictions were applied to the lawmaking role of state legislatures, reducing borrowing and capital expenditure powers,

including provisions for general rather than special charters of incorporation, and making just compensation a constitutional principle.[16]

The growing distrust of state legislatures engendered the belief that a check on legislative behavior was required. Limitations and controls over legislative acts were being written into state constitutions, and there was no obvious candidate to enforce them other than the courts.[17] Although the incidence of judicial review of legislative actions by state appellate courts would increase most dramatically after the Civil War,[18] its exercise by antebellum judges nonetheless reinforced their growing role as policymakers. Friedman (1985, 356) writes that the state courts during this period, while not on par with state legislatures, were increasingly "a force to be reckoned with."

As a result of all this, the independence of state courts from state legislatures became an issue of public concern. Some states reacted by transferring appointment powers from legislature to governor, and replacing tenure during "good behavior," which had left substantial discretion in the hands of the legislature, with fixed terms. But the desire for courts to be more fully divorced from politics was widely voiced. Paradoxically, a cry also arose for courts to be more responsive to the popular will—the same populist and antigovernmental pressures that

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[16]The decline in the influence of the legislature was partly counterbalanced by increases in the power of the executive—gubernatorial veto, pardon, and appointment privileges were all expanded.

[17]Friedman (1985, 361) notes that the answer to the increasingly heartfelt question of who would enforce checks on the legislature was "Either no one or the courts," and suggests that given the opportunity, judges simply "leaped to the bait." Dodd (1928, 81) writes of the state courts that "they were able to assume this power largely because of the early development of distrust of the legislatures and of the feeling that some check upon legislative power was needed. Once established, judicial power over legislation has steadily grown."

[18]See Friedman (1985, 355-6) for figures on the amount of judicial review by state over time (and various relevant citations, as well).

were directed against the legislatures were also aimed on occasion at the judiciary.[19] This was consistent with another political development of the time, the rise of Jacksonian Democracy. As it became increasingly clear that delegating responsibility to legislators had failed to ensure publicly-interested legislation, pressure to replace appointive offices of all kinds with direct elections grew—the public, itself, would act as monitor. State constitutions were widely written and re-written during this period,[20] and broader questions of popular control and the separation of powers dominated the constitutional conventions, with each new constitution sharply increasing the number of elected officials in all spheres.[21]

Given this emphasis on direct popular election, it would have been surprising if calls for judicial elections had not arisen, and indeed they did.[22] But while Jacksonian reformers wished to make policy more responsive to the public will, court reformers were primarily interested in protecting courts from legislatures. Judicial elections were intended, first and foremost, to provide judges with an independent base of power that would enable them to stand up to legislative pressure. Abner Keyes, speaking to delegates at the Massachusetts constitutional convention put it thus: "Elect your judges, and you will energize them, and make them

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[19]For example, Charles Reemelin, a farmer and delegate to the 1850-1 Ohio constitutional convention, claimed that popular election would reduce "the aristocratic tendencies" of the judiciary. Quoted in Hall (1989, 104).

[20]See, e.g., Bromage (1936, 27) and Hall (1989, 104).

[21]A delegate at the Kentucky constitutional convention of 1849-50 complained, "We have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well." Quoted in Hall (1983, 340).

[22]The practice of choosing trial court judges in popular elections had been accepted in several states as early as the 1830s, but had previously failed to spread to the appellate bench. See Carpenter (1918).

independent, and put them on par with the other branches of government."[23] Because of this, reformers did not adopt all the prescriptions of the Jacksonian period—they did not want to make judges *too* susceptible to the popular will. Staggered judicial elections were established, to ensure that no sudden surge in party feeling would result in one party taking over a state court. Appellate court elections were to be held within a district or circuit rather than state-wide, to limit the control that could be exercised by party leaders at state nominating conventions. Fixed terms of reasonable length (average 9.7 years) were written into law, eliminating the "good behavior" clauses that had given sitting officials so much discretion over judicial tenure. Judges were also made ineligible to run for other offices while on the bench.

In brief, what was desired by the reformers was an independent court, not a court subject to the popular will, and in this they differed from the Jacksonians.[24] Lawyers, who were generally instrumental in the reform effort, were also concerned with status of bench and bar, and believed that popular elections would enhance judicial prestige.[25] In addition, it was maintained (for public consumption at least) that elected judges would be more likely to implement reforms in pleading and procedure than would appointed courts (Hall 1983, 344). Indeed, partisan judicial elections were part of a broader court reform movement that included a

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[23]Quoted in Hall (1983, 350). Hall (1989, 104) writes, "[M]any members of the bench and bar who controlled the convention committees who crafted the judiciary articles, embraced popular election as a counterweight to legislative authority."

[24]As noted above, this was not true of everyone—radical Democrats supported judicial elections because they believed elections would diminish power of judges to thwart popular will (they thought the result would be to curtail judicial review). See Hall (1983, 341).

[25]Lawyer delegates (i.e., delegates who were lawyers) played a large role in all state constitutional conventions, and always controlled the committees on the judiciary (Hall 1983, 342-3). They tended to drawn from both the Whigs and the Democrats (the two major parties of the time), but from the moderate wings of each, and evidently had little difficulty working together. See Hall (1983) and Nelson (1993) for detail.

variety of plans for a more efficient administration of justice, such as centralizing judicial structures and reducing court administration costs.[26] In this context, judicial elections were endorsed as a means of stimulating greater productivity on the bench by making judges directly accountable to the people that sat before them. The new procedures, according to one of the Ohio delegates, promised "swifter justice . . . greater economy . . . and a judiciary accountable to the people."[27]

Summing up, the widespread replacement of legislative and gubernatorial appointment of state judges by partisan judicial elections was motivated by the rising perception of a need for an effective third-party enforcer to monitor the actions of state legislatures—elected representatives had been shown to be less faithful agents than anticipated. Judicial elections were primarily an attempt to make courts independent of officials in the other two branches by providing them with an electoral base of power of their own.

C. The Second Change: Nonpartisan Judicial Elections, circa 1910

Partisan elections (of all kinds, not just judicial) soon disappointed, as it became apparent that election results were subject to manipulation, and that elected officials could be captured by partisan forces. Observation of the corrupt workings of party machines led to the search for new approaches to ensure publicly-interested policy outcomes. What emerged was a faith in the "scientific" management of "experts"—policy was to be implemented by actors divorced from the hurley burley of political competition. Hall (1989, 195) writes, "Industrialization and

[26]Large backlogs of court cases had become politically controversial (Hall 1983, 343). As a result of the reforms, many states cut back on circuit riding and consolidated specialized courts.

[27]Quoted in Hall (1983, 344). Interestingly, similar promises of productivity enhancements would be used by the bar 100 years later to justify the merit plan.

urbanization unleashed social changes that the traditional distributive scheme was incapable of accommodating. Third parties and social reform movements burst on the scene to urge a new view of law and legal institutions designed to serve disaffected social constituencies."

The first large movement for change was Populism, which initially appeared after Civil War in the form of social and mutual aid societies. The Populists entered electoral politics in the 1880s, with platforms based on assisting farmers, laborers, and small businesses by developing a scientific body of regulation and administrative practice. The 1892 Populist platform called for the nationalization of railroads, the protection of public lands, an end to monopolies, the regulation of shipping, a graduated income tax, and the abandonment of the gold standard (which they felt would help debtors). Populists succeeded in winning political control in Kansas and Nebraska in the 1890s, and were strong elsewhere in the 1880s, particularly in rural areas.

Populism was primarily a rural phenomenon; in urban areas, a national movement known as the Mugwumps emerged in the mid-1880s. They also dedicated themselves to reforming the political process so as to lessen partisan influences on policy making. Their goal was the placement of political control in the hands of the "best men," and stressed the virtues of "independence" and "expertise."

The themes of the Populists and Mugwumps were combined in the Progressive movement of the late 19th / early 20th century. The Progressives emphasized the need for "scientific" and "rational" policy management. Progressive reforms included registration requirements, nonpartisan ballots, the Australian ballot (which allowed the splitting of tickets), the direct party primary, and other devices intended to eliminate restrictions on suffrage and to weaken party machines. Among the disparate groups included under the Progressive umbrella

were those concerned with antitrust, railroad regulation, women's suffrage, and the abolition of child labor. But all were united in the conviction that legal and political institutions had to be modified to meet their goals. Hofstadter (1955, 248) concludes of the Progressives, "[They] expected that the [neutral] state, dealing out evenhanded justice, would meet the gravest complaints. Industrial society was to be humanized through the law."

The first formal bar associations were established during this period, galvanized by opposition to the power over state courts exercised by party machines.[28] The major legal journal of the late 19th century, the *American Law Review*, complained in 1871 that "a great democratic flood . . . [had filled] the bench with political partisans, the minor legal offices with political hacks, and the bar with an indiscriminate herd of camp followers" (Quoted in Matzo 1984, 78). Lawyers feared that they were losing out in prestige—and potentially in income—to such scientifically based professions such as medicine, engineering, and chemistry. In response, uniform standards of legal education and conduct were established. Harvard revolutionized legal education (Friedman 1985, 606). Large law firms appeared, driven by the industrialization and urbanization of American society, as well as by the needs of large corporations (Hobson 1984). There was also increasing uniformity in state laws, and an increasingly general common law.

What remained, as far as the bar was concerned, was the task of reforming judicial selection and retention procedures. The experience with partisan elections had shown that an elected court, rather than being rendered independent of incumbent politicians, simply became

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[28]For example, the City Bar Association of New York was established in the aftermath of the Erie Canal scandal, in which judges in the pay of the Tweed ring had been compromised (Friedman 1985, 373; Gordon 1984, 57; Matzo, 1984, 80). The association's founders said that their goal was to restore "honor, integrity, and fame of the profession in its two manifestations of the Bench and Bar." Quoted in Matzo (1984, 80).

responsive to the same political forces that dominated legislatures. What was necessary was to insulate judges from such forces instead. Upon its founding in 1878, the American Bar Association came out strongly against partisan judicial elections on the grounds that judges were thus subjected to undue and damaging political pressure.[29] This was somewhat ironic considering that lawyers, as constitutional delegates, had been an important influence on the design of partisan judicial elections in the first place. However, the expectation had been that partisan elections would provide a state judge with an independent base of power, and they had instead allowed party machines to capture the courts. The bar's disillusionment with partisan elections was an echo of that voiced by the Progressives. The remedy was also a Progressive remedy—the nonpartisan election. The constitutional and statutory provisions relating to judicial elections were to be altered from an informal, party-based process to a formal, state-supervised one.

As was the case in the previous reform, the application of the popular movement's remedies went only so far as helped to produce an independent (of the other branches) state judiciary. While the bar lobbied for nonpartisan judicial elections, it fiercely opposed the Progressive proposal that the candidates for these elections be chosen in direct primaries. In addition, the importance of involving the bar in candidate selection was increasingly emphasized.[30] Simeon E. Baldwin, the first president of the American Bar Association, was

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[29]Hall (1989, 368-9) writes, "The new generation of bar association leaders and Progressive political reformers concluded that democratic and professional accountability could be enhanced by eliminating partisanship while giving the increasingly professional bar a greater role in the judicial selection process."

[30]Sheldon (1988, 46-7) suggests that a factor in the bar's opposition to direct primaries during this period was the fear that it would reduce the influence of bar over candidate selection.

quoted as saying that he considered the extent to which the bar could influence the candidate selection process as important as the particular method of selection (Hall 1984a, 349).

In sum, the desire to allow courts to operate as independent third-party monitors of the legislative and executive branches remained unaltered, but the means of doing so changed—"insulation" replaced "separate base of power" as the source of judicial independence. Voters had proved no more able to monitor the policy decisions of judges than they had been able to monitor the policy decisions of elected legislators.

D. The Final Change: The Merit Plan

Faith in impartial and expert administrative decision makers disappeared with the 20th century rise of the administrative state. "Expert" administrative agencies were increasingly perceived as large, powerful, unresponsive, and unaccountable. Indeed, an increasing amount of court activity involved overseeing agency decision making. Nonpartisan elections for public officials also disappointed, as party machines proved nearly as adept as before at capturing the candidates.[31] The bar remained as committed as ever to freeing courts from political influence, but the preferred means of doing so again changed.

The roots of the merit plan are found in a famous address delivered in 1906 by Roscoe Pound, in which he called for reforms to state court systems to limit political influences on state judges.[32] With that goal in mind, Pound helped found the American Judicature Society (AJS) in 1913 (Winters 1966, 1084). The Society's co-founder, Albert Kales, was made responsible for

[31]See Sheldon (1988) and Dubois (1980) for discussions of how party politics insinuated itself into the selection process despite the lack of partisan ballot designation.

[32]The speech was titled "The Causes of Popular Dissatisfaction with the Administration of Justice." See Pound (1962) for a reprint.

drafting a new procedure for selecting state judges; that draft forms the basis of today's merit plan. The merit plan typically requires the governor to appoint one of several judicial candidates whose names are submitted by a nonpartisan nominating commission, consisting of both laymen and lawyers. The lay members of the commission are appointed by the governor, while the lawyers are appointed by the state bar association. The commission is often chaired by the chief justice of the state supreme court. After serving a fixed term, rather than having to be reappointed, the judge faces the voters in a noncompetitive "retention" election—no opposing candidates are permitted, and voters simply vote yes or no to the question, "should judge X be retained in office."

There is today a strong consensus that, of all the procedures, the merit plan best insulates the state judiciary from partisan political pressure. Of merit plan judges, Dubois (1980, 163) writes, "They have no constituency of contributors, supporters or voters whose support they must cultivate by their own on-the-bench behavior." Tarr (1994, 73) writes of retention elections, "[T]he lack of information virtually guarantees that judges will be returned." As it had with the other procedures, the bar took the lead in campaigning for the merit plan.[33] Through the mandated nominating commissions, the bar's participation in candidate selection—something it had sought for decades—was written into law. Finally, as was the case with partisan judicial elections, the implementation of the merit plan was (and is) often part of a broader campaign for court reform (see, e.g., ACIR 1982).

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[33]Scheb (1988, 170) writes of state campaigns, "The merit plan has generally been promoted by the organized bar, [and] high-status lawyers." Of the eleven state court reform (including the merit plan) initiatives that Berkson and Carbon (1978) examine, the state bar played the prominent advocatory role in all but one. McClellan (1991) describes the Florida bar's leadership of the campaign to institute merit appointment in that state, while Cameron (1976) and Heinicke (1967) tell similar stories for Arizona and Colorado. See Hanssen (2002) for a detailed discussion the bar's role in the promotion of the merit plan.

In sum, the consensus remains that state judges should be independent of the other branches of government, and that insulating judges from political influence is the best means of ensuring this.[34] For the most part, potential social losses from judicial agency problems (from "activist judges," for example) are today considered to be of lesser magnitude than those from either agency problems with respect to elected representatives, or from voter ignorance, manifest in the inability of voters to monitor the behavior of elected judges.[35]

## *IV. WHY ALL STATES DID NOT ADOPT NEW PROCEDURES*

### A. Who Changed and Who Did Not?

Figure 4 presents a series of maps identifying the states that switched selection procedures by period. The first map (4a) contains all states that had entered the Union by 1847 (the first partisan election year) and highlights those that switched to partisan judicial elections, the second (4b) contains all states that had entered the Union by 1910 (the first nonpartisan election year) and highlights those that switched to nonpartisan judicial elections, and the third (4c) contains all states that had entered the Union by 1950 and highlights those that switched to the merit plan. In each case, there is some evidence of regional concentration. With respect to partisan judicial elections, the New England states were the most conspicuous non-switchers, although New Jersey, Delaware, and South Carolina did not adopt partisan elections either.

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[34]The extent to which the merit plan procedures effectively insulate judges from partisan forces may be debated—Hall (2001) suggests that merit plan judges are more pervious to partisan influences than reformers generally suggest. I speculate on why reformers have not (as of yet, at least) pushed for life terms for state judges (the federal court solution) in this paper's conclusion.

[35]See Glaeser, Johnson, and Shleifer (2001) and Maskin and Tirole (forthcoming) for good related examinations of the costs and benefits of granting power to an unaccountable judge versus to an accountable politician.

Nonpartisan elections were most prevalent along the northern border with Canada and in the West until after 1950, when several Southern states adopted nonpartisan elections, too. By 1990, the merit plan was concentrated in the middle of the country, with Florida and Maryland the outliers. However, states on both coasts have adopted at least one of the merit plans two central features: The nonpartisan nominating commission and retention elections.

Interestingly, each map highlights a largely distinct block of states. One reason is that only seven of the twenty partisan election states shown in 4a subsequently switched to nonpartisan elections (4b), and only three of the original partisan elections states switched to the merit plan 100 years later (4c). Furthermore, only six of the twenty states that switched to nonpartisan elections (4b) switched to the merit plan subsequently (4c). The average American state changed methods only 1.48 times, and only two states changed three times, excluding the volatile post-Civil War period.[36] Maryland is the only one of the twenty-nine states that span all four periods to have employed all four methods of selecting and retaining judges. In sum, despite the avowed benefits detailed by the proponents of each new procedure (i.e., a more independent judiciary), *changes* in judicial selection and retention procedures were somewhat uncommon among the American states.[37]

B. The Costs of Changing Judicial Procedures

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[36]See the discussion of the post-Civil War period in footnote 9 above.

[37]Listed on each state in each map is also the year and the order in which the state made the change. No consistent pattern is apparent. The majority of switches to partisan elections happened during the single decade following 1847. By contrast, the switch to nonpartisan elections occurred in several waves: ten states switched between 1910 and 1916, four states between 1932 and 1943, three states in 1952, and three states thereafter (one by decade). Adoption of the merit plan has been somewhat steadier: three states switched to the merit plan before 1960, six during the 1960s, four during the 1970s, and two during the 1980s.

Why were changes in selection and retention procedures relatively uncommon? Presumably, such changes were costly. This section focuses on three potential costs: i) the administrative expense, ii) resistance by incumbents in the other branches, and iii) generalized opposition to changing institutions.

i. Administrative cost

First and most simply, altering judicial selection and retention procedures typically requires amending a state constitution, which is a lengthy and expensive process.[38] Indeed, across all three periods, the adoption of new procedures was most frequent where state constitutions did *not* have to be amended.

To begin with, as can be seen in figure 2, new states to the Union implemented each new procedure in substantially greater proportions than states already in the Union (in fact, new states almost invariably adopted the newest procedure).[39] Furthermore, with respect to *existing* states (i.e., state that had to *change* a procedure), a much larger proportion switched to partisan judicial elections during the latter half of the 19th century than switched to nonpartisan elections or the merit plan during the 20th century. The latter half of the 19th century was also (as discussed in the previous section) a period of wholesale constitution re-writing. Table 2 shows that of the 21 replacements of judicial appointment by partisan elections that occurred in the 19th century, 17 took place in the context of the writing of new (i.e., replacement) state constitutions. By

[38]The typical path to constitutional amendment begins with an advertising campaign, followed by signature gathering (to get the proposed amendment on the ballot), more campaigning, and so forth. For more detail, see Berkson and Carbon (1978). See also Heinicke (1967), who describes the efforts required to put a constitutional amendment initiative for the merit plan on the ballot in Colorado, and then to get the initiative approved, and Cameron (1976), who does the same for Arizona.

[39]Clearly it is no more costly initially to adopt the newest procedure than to adopt an older procedure, so the newer procedure will be chosen if it is even marginally preferable.

contrast, of the nine existing states that did *not* switch to partisan elections (and therefore are not listed in table 2), eight also did not re-write their constitutions.[40]

Finally, as can also be seen in table 2, every existing state that adopted nonpartisan judicial elections had previously employed partisan judicial elections, a uniformity not apparent for the other changes in procedure. The simple reason is that no constitutional amendment was required in that case. State constitutions specify only the broad outlines of a procedure ("judges will be chosen by the electorate"), while the details (partisan versus nonpartisan vote) are provided in supporting statutes. Changes from partisan to nonpartisan judicial elections could thus be made via less costly statutory revisions.[41]

ii. Opposition from the other branches

Attempts to implement new judicial selection and retention procedures often faced resistance from incumbents in the other branches.[42] As discussed, each new procedure was

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[40]Of course, it is important to be sure that it was not the desire to alter judicial procedures that led to the constitution re-writing; i.e., that the causality did not go in the other direction. And indeed, in no case is there any evidence that the desire to implement partisan judicial elections was an important spur to 19th century constitutional reform. Most state constitutional conventions were called to address specific problems: the railroads, banking regulation, suffrage, reapportionment (Friedman 1985, 349). Indeed, in only four conventions was the manner in which judges were selected sufficiently controversial so as to require even a roll call vote (Ohio, Kentucky, New York, and Indiana); see Hall (1983, 342).

[41]For example, Montana was able to switch from partisan to nonpartisan judicial elections through a change in statute in 1935 because its 1890 constitution read simply, "The Justices of the Supreme Court shall be elected by electors of the State at large," without detailing the election rules. By contrast, the 1821 constitution of the state of New York read, "The governor shall nominate, by message, in writing, and with the consent of the senate shall appoint all judicial officers," so that New York's 1847 switch to partisan judicial elections required re-writing the corresponding constitutional provisions—the revised New York constitution stated instead, "There shall be a Court of Appeals, composed of a Chief Judge and six Associate Judges, who shall be chosen by the electors of the state". (Quotations taken from Thorpe 1906).

[42]For recent examples of such resistance, see Berkson and Carbon (1978), Dubois (1990), and Champagne and Haydel (1993).

intended (initially, et least) to increase the independence of state judges. It has been hypothesized that resistance by incumbents to increases in judicial independence will vary with the strength of incumbent hold on power.[43] On the one hand, by establishing an independent court, incumbent policymakers render it more costly for a future regime to alter the policies they pass today (indeed, this is one of the main justifications for an independent court).[44] On the other hand, independence allows judges to engage in policymaking of their own, which may alter policy in undesirable ways as far as incumbents are concerned. In short, from the perspective of policymakers in the other branches, there are both benefits (in terms of future policy durability) and costs (in terms of current policy control) to an independent judiciary.[45] The more certain is an incumbent to remain in power, the smaller the gains from policy durability, and hence the less desirable an independent court.

Using the size of the legislative majority as a proxy for the strength of incumbent hold on power, I find evidence consistent with such a tradeoff. States that switched to partisan judicial elections (which were originally intended to increase the independence of state judges) in the

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[43]This idea is formalized and explored more thoroughly in Hanssen (forthcoming). See also Ramseyer (1994), who uses the tradeoff to explain why Japanese courts are less independent than American federal courts; and Ferejohn (1999), who provides a good related discussion.

[44]A judge who cannot be penalized by incumbents in the other branches can strictly enforce constitutional and statutory provisions (thus making policy changes more difficult), while a judge who *can* be penalized—deprived of office, for example—is more likely to simply accede to whatever those in power wish.

[45]In a widely-cited article, Landes and Posner (1975) propose that political support for an independent judiciary derives from the fact that it renders policymaking more durable, because independent judges will interpret legislation in terms of its writers' original intent (which raises in turn the price that incumbents can charge for policy). A number of researchers (e.g., Epstein 1990 and Macey 1986, 1987) have criticized the Landes and Posner hypothesis on the grounds that it fails to explain why an independent court would evaluate legislation in terms of original intent rather than, say, in accord with the judge's own ideological preferences. That, in a nutshell, is the tradeoff outlined here.

19th century had average legislative majorities of 64 percent, while states that did not switch had average majorities of 72 percent. States that switched to nonpartisan judicial elections (also intended to increase the independence of state judges) had average majorities of 72 percent versus 78 percent for non-switchers. And states that switched to the merit plan (today's preferred method for increasing the independence of state judges) had average majorities of 64 percent versus 72 percent of non-switchers. All the differences are statistically significant at the one percent level.

iii. The age of the institution

Figure 4 illustrates an interesting difference between switching and non-switching states: "Younger" states (i.e., states that joined the Union relatively more recently) tended to switch procedures more readily than "older" states. The average existing state that switched to partisan elections entered the Union in 1813, versus in 1794 for those that did not switch. The states that switched to nonpartisan elections entered the Union in 1862 versus 1812 for those that did not. The states that switched to the merit plan entered the Union in 1858 versus 1822 for those that did not. All the differences are significant at less than one percent. North (1991, 1998), among others, has hypothesized that individuals and groups invest in skills in order to exploit given institutions (i.e., to use the institutions to redistribute resources to themselves) and that although in some cases competition between groups may force adaptations to the skill set—and thus promote institutional change—to the degree the skills are sunk, institutional change will be resisted.[46] The longer an institution has been in place, the more firmly entrenched the

[46]North (1998, 19) briefly discusses several instances where payoff structures mitigate against institutional improvements.

institution's supporters, and the more difficult is the institution to change, all else equal. The year a state joined the Union proxies for the length of time a particular judicial selection and retention procedure has been in place. Thus, the older the state, the lower the likelihood of switching procedures.[47]

C. Multivariate Analysis

The above discussion thus highlights three factors that appear to be related to the likelihood of states adopting new procedures: whether a constitution needed to be amended, the strength of incumbent politicians' hold on power, and the length of time the state has been in the Union. Of course, other factors may matter as well as—or instead of—these factors. In order to investigate the question more systematically, I will conduct a multivariate analysis, using a probit model. My basic equation, which I will estimate separately for each new selection and retention procedure, will be

$$\boldsymbol{y}^*_{it} = X_{it}\beta + \epsilon_{it}$$

where $\boldsymbol{y}^*_{it}$ is the net benefit to state $i$ of switching procedures during year $t$, $X$ is a matrix explanatory variables, $\beta$ is a column vector of unknown coefficients, and $\epsilon$ is an error term. Of course, the net benefit of switching procedures can not be observed, but whether a state actually switches can be. I will therefore make use of the standard index function model:

$$y_{it} = 1 \text{ if } \boldsymbol{y}^*_{it} > 0$$
$$y_{it} = 0 \text{ if } \boldsymbol{y}^*_{it} \leq 0$$

[47]If instead one considers the year of the last change in judicial selection procedures (which, for many state, is indeed the year they joined the Union), the result is the same: 1835 for non-switching states versus 1875 for switching states with respect to nonpartisan elections and 1873 for non-switching states versus 1892 for switchers with respect to the merit plan.

where $y_{it}$ is the observed institutional response. My dependent variable will equal 1 if a state switched to a new procedure during the given period (partisan election, nonpartisan election, and merit plan periods will be estimated separately) and 0 otherwise. The coefficient vector $\beta$ will indicate the effect of the right-hand side variables on the probability of states making the switch.

The matrix $X$ contains the three primary variables of interest: 1) whether the state held a constitutional convention during the preceding decade (predicted coefficient positive), 2) the size of the majority in the state legislature (predicted coefficient negative), and 3) the year the state entered the Union (predicted coefficient negative). I will also include several political and socio-economic control variables in the equation: the political party with the majority in the legislature (specifically, the proportion of time Democrats were the majority party), population, urbanization, the number of farms per capita, and manufacturing employment per capita.[48] Finally, I will include regional dummy variables in some of the specifications, to directly capture regional differences. Descriptions of these variables and their sources are shown in table 3.

The data set consists of observations from census years, because the socio-economic controls are only available for the census years during the 19th and early 20th centuries, and because the political variables are available only sporadically, particularly for the 19th century, and averaging them over each decade reduces noise. I will include in each estimation only the states that had already entered the Union (and were therefore already using some other selection and retention procedure) at the point each new procedure was introduced—the emphasis in the

[48]The latter two variables are intended in part to proxy for per capita state income, because consistent state-level income measures are not available the entire sample period (1850-1990). In addition, systematic changes in regional and local economies have taken place throughout this country's history, which these variables will help to control for. Using available (though different for each period) measures of income produces effectively the same results as those presented.

estimations is on why states *switched* procedures.[49] The panel will not be balanced, as data are not available for all states for all years.[50] Each of the three data sets (one for each period of change) contains between 193 and 264 observations. Between 20 and 50 percent of the observations in each data set are 1's.

Table 4 presents the results from the probit estimations, with marginal effects listed so as to allow easy comparison. Columns 1 and 2 show the estimates for the partisan election period (the census years from 1850-1910), columns 3 and 4 show the estimates for the nonpartisan period (the census years from 1910-1960), and columns 5 and 6 show the estimates for the merit plan period (the census years from 1960-1990).

With respect to the variables of interest, the results are as predicted. First, holding a constitutional convention increases the ceteris paribus probability of employing partisan elections by about 20 percent (significant at the ten percent level). That variable has no effect on the probability of the using the merit plan, and can not even be included in the nonpartisan election equation, for the simple reason that very few constitutional conventions were held after the partisan election period. Indeed, of the roughly 90 state constitutional conventions that have taken place over this country's history (not counting each state's original constitutional convention), only 14 were held after 1910.

The other two variables of interest are also of the predicted signs and are statistically significant at the ten percent level or better for all three periods. The magnitudes of the

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[49]New states to the Union, as figure 2 shows, almost invariably adopted the newest procedures.

[50]Information on the composition of the state legislature is particularly sporadic during for the 19th century for all states, and in the 20th century for states such as Minnesota and Nebraska, which each employed nonpartisan legislatures for at least part of the sample period.

estimated coefficients imply that each 1.0 percent increase in the size of the majority in the state legislature is associated with a roughly 1.0 percent decrease in the likelihood of partisan elections, a 0.3 percent decrease in the likelihood of nonpartisan elections, and a 0.7 percent decrease in the likelihood of the merit plan. Each additional year a state waited to join the Union is associated with a 1.0 percent increase in the probability of a state using partisan elections, a 0.4 percent increase in the probability of using nonpartisan elections, and a 0.2 percent increase in the probability of using the merit plan. These results are robust to the inclusion of regional controls, which in some instances even increase the size of the marginal effects.

With respect to the other variables, no consistent pattern is apparent. Democratic control made switching to partisan elections significantly more likely, but had no effect on the adoption of other procedures after controlling for regional effects. Larger and more urban populations are positively associated with partisan elections and with the merit plan, but not with nonpartisan elections. Controlling for regional effects, more farms are associated with lower likelihoods of nonpartisan elections and the merit plan, but a higher likelihood of partisan elections. Manufacturing employment is significant only for the merit plan. Finally, the coefficients on the regional dummy variables summarize (more or less) what is shown in the maps in figure 4. Partisan judicial elections were least likely in the Northeast (note that there were no Western states in 1850) and nonpartisan elections in the South and Northeast (for which a dummy variable could not even be included, because no Northeastern state employed nonpartisan elections), while the merit plan was distributed around the country with a fair degree of uniformity.

## *V. CONCLUSION*

While much has been written on the effects of independent courts, less is known about how and why they emerge. This analysis has traced the development of the procedures used today to select and retain judges in the American states. I conclude as follows: Each new procedure developed in attempt to shelter state judges from the influence of incumbent political officials in the other branches (and the forces they represent), and were inspired in large part by revisions in understandings of the agency problems involved. However, not all states changed procedures when the opportunity arose. State's with larger legislative majorities were less likely to do so, consistent with the hypothesis that a stronger hold on power reduces the attractiveness of an independent court to incumbent politicians. More recent entrants to the Union were more likely to do so, consistent with the hypothesis that newer institutions are less costly to alter. Finally, the fact that judicial selection and retention procedures are written into state constitutions appears to have been a barrier to change: Where state constitutions did not have to be amended, or were being re-written anyway, states were more likely to adopt new procedures.

Before finishing, it is worth noting that the role of the bar in the emergence of each of the new procedures raises some questions. As discussed in section III, members of the bar were instrumental in the design and dissemination of each new judicial selection and retention procedure. Given that of all groups affected by the composition and structure of the court system, none (arguably) has more at stake than lawyers, their participation is to be expected; furthermore, the design of judicial institutions is a public good, from which the single voter may not gain sufficiently to inspire participation. But how did the bar's involvement affect the nature of the institutions that were developed? On the one hand, it is possible that what was (and is) optimal socially might also be optimal for the bar. Evidence indicates that means of dispute

resolution lying outside the formal legal system are resorted to when confidence in formal legal institutions falls sufficiently (see, e.g., McMillan and Woodruff 1999). The bar would thus have a strong interest in ensuring that confidence in judicial institutions was maintained. Indeed, each reform effort was inspired in part by unhappiness among the general public with the condition of the state courts.

On the other hand, an interesting aspect of the various reforms was that none was an attempt to re-create the institutions of the federal judiciary. Had the reformers in the bar truly been interested in simply establishing an independent state judiciary, this would seem to have been the most straightforward approach. There are two possible explanations. The first is that the bar was constrained by the starting point—the pre-existing institution. The institutions of the federal judiciary were established at a time when there was great concern with checking the ability of the federal government to impinge on the rights of its citizens, which, to a large number of the Constitution's writers, meant the rights of the states. The individual states faced no such problem, and were happy initially (as discussed above) to delegate broad, largely unchecked, powers to their legislatures. Judicial elections were chosen as the remedy when legislative abuses were recognized, and once judges were being elected, taking that right from citizens may have been politically difficult.[51] Elections are a solution to what has been termed the "countermajoritarian difficulty;" a politically-insulated court passing judgement on the decisions of elected representatives. Both nonpartisan elections and the merit plan left the ultimate right to determine whether a judge remained on the bench with the electorate, but

[51]Indeed, debates over recent judicial reform efforts have been consistently couched in terms of a tradeoff between two desirable but conflicting goals: judicial accountability to the general public, and judicial independence. See, e.g., Champagne and Haydel (1993), Lovrich and Sheldon (1983).

progressively reduced the ability of political parties to influence judges (thus reducing as well, of course, the information available to voters). This was perhaps the only practicable manner of insulating state judges from "politics."

Another possibility is that the bar's own influence over the judiciary would have been reduced had life terms for judges been enacted. With the 1921 passage of Canon II of its Canons of Professional Ethics, the American Bar Association formally committed itself to the playing of an active role in the recruitment of judges.[52] The merit plan goes one step further by giving state bar associations a participation in candidate choice that is written into law.[53] The bar, like any organization, may be expected to act in its members' interests first.[54] The only question is the degree to which, in this instance, its members' interests and those of the public converged.

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[52]The text reads "It is the duty of the bar to endeavor to prevent political considerations outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench." Quoted in Sheldon (1988, 73). The justification for this was straightforward: the bar is the repository of professional expertise, and thus can best determine whether the candidates possess the requisite capabilities; see, e.g., Wasby (1978).

[53]Sheldon (1977) sent questionnaires to the executives of state bar associations asking them to identify the effectiveness of their various efforts to influence the selection of state judges. The most effective method identified was involvement in a merit plan nominating commission. Sheldon writes, "The importance of the bar reaches its zenith in those states using the [merit] Plan" (400). He also writes that "One of the motivations for unifying (integrating) state bars is to be able to concentrate the profession's efforts on elevating preferred candidates to state benches." (399)

[54]The bar has a long history of attempts to reduce the competition it faces. For example, it sought to restrict the influence of lay judges in the late 18th/early 19th century, (see Friedman 1985, 138; Aumann 1940, 42), of juries vis a vis judges throughout (see Hall 1989, 107-8; Horwitz 177, 28), and the use of extralegal arbitration, which was very common in 18th century America (Horwitz 1977,145).

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## TABLE 1: HISTORY OF SELECTION AND RETENTION PROCEDURES

| State | Year joined Union | As of 1846 | As of 1909 | | As of 1957 | | As of 1990 | |
|---|---|---|---|---|---|---|---|---|
| | | | method | year switched | method | year switched | method | year switched |
| Delaware | 1787 | gv | gv | | gv | | gv w' com. | 1989 |
| New Jersey | 1787 | gv | gv | | gv | | gv | |
| Pennsylvania | 1787 | gv | p | 1850 | p | | p w' ret. | 1968 |
| Connecticut | 1788 | l | l | | gv | 1952 | gv w' com. | 1987 |
| Georgia | 1788 | l | p | 1896 | p | | np | 1984 |
| Massachusetts | 1788 | gv | gv | | gv | | gv | |
| Maryland | 1788 | gv | p | 1851 | np | 1952 | mp | 1976 |
| New Hampshire | 1788 | gv | gv | | gv | | gv | |
| New York | 1788 | gv | p | 1847 | p | | gv w' com. | 1978 |
| South Carolina | 1788 | l | l | | l | | l | |
| Virginia | 1788 | l | l | | l | | l | |
| North Carolina | 1789 | l | p | 1868 | p | | p | |
| Rhode Island | 1790 | l | l | | l | | l | |
| Vermont | 1791 | l | l | | l | | gv w' ret. | 1984 |
| Kentucky | 1792 | gv | p | 1850 | p | | np | 1968 |
| Tennessee | 1796 | l | p | 1853 | np | 1952 | p | 1966 |
| Ohio | 1803 | l | p | 1851 | np | 1911 | np | |
| Louisiana | 1812 | gv | p | 1904 | p | | np | 1976 |
| Indiana | 1816 | gv | p | 1851 | p | | mp | 1968 |
| Mississippi | 1817 | l | gv | 1868 | p | 1914 | p | |
| Illinois | 1818 | l | p | 1848 | p | | p w' ret. | 1971 |
| Alabama | 1819 | l | p | 1867 | p | | p | |
| Maine | 1820 | gv | gv | | gv | | gv | |
| Missouri | 1821 | gv | p | 1850 | mp | 1940 | mp | |
| Arkansas | 1836 | l | p | 1874 | p | | p | |
| Michigan | 1837 | gv | p | 1850 | np | 1943 | np | |
| Florida | 1845 | l | p | 1887 | p | | mp | 1972 |
| Texas | 1845 | gv | p | 1876 | p | | p | |
| Iowa | 1846 | l | p | 1857 | p | | mp | 1962 |
| Wisconsin | 1848 | | p | original | np | 1914 | np | |
| California | 1850 | | p | original | np | 1911 | gv w' ret. | 1934 |
| Minnesota | 1858 | | p | original | np | 1912 | np | |
| Oregon | 1859 | | p | original | np | 1932 | np | |
| Kansas | 1861 | | p | original | p | | mp | 1958 |
| West Virginia | 1863 | | p | original | p | | p | |
| Nevada | 1864 | | p | original | np | 1915 | np | |
| Nebraska | 1867 | | p | original | np | 1913 | mp | 1962 |
| Colorado | 1876 | | p | original | p | | mp | 1966 |
| Montana | 1889 | | p | original | np | 1935 | np | |
| North Dakota | 1889 | | p | original | np | 1910 | np | |
| South Dakota | 1889 | | p | original | np | 1916 | mp | 1981 |
| Washington | 1889 | | p | original | np | 1912 | np | |
| Idaho | 1890 | | p | original | np | 1935 | np | |
| Wyoming | 1890 | | p | original | np | 1915 | mp | 1973 |
| Utah | 1896 | | p | original | np | 1952 | mp | 1967 |
| Oklahoma | 1907 | | p | original | p | | mp | 1967 |
| Arizona | 1912 | | | | np | original | mp | 1974 |
| New Mexico | 1912 | | | | p | original | mp | 1989 |
| Alaska | 1959 | | | | | | mp | original |
| Hawaii | 1959 | | | | | | mp | original |

KEY: *gv* = appointment by governor; *gv w' com.* = appointment by governor from list assembled by nonpartisan nominating commission; *gv w' ret.* = initial appointment by governor, retention via uncontested retention election

*l* = appointment by legislature; *mp* = merit plan appointment; *np* = nonpartisan election

*p* = partisan election; *p w' ret.* = initial partisan election, retention via uncontested retention election

**TABLE 2: CHANGES IN SELECTION PROCEDURES BY PERIOD**

| ***Changed to partisan elections*** | | | | ***Changed to nonpartisan elections*** | | | | ***Changed to merit plan*** | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *state* | *year* | *previous* | *constit. convent?* | *state* | *year* | *previous* | *constit. convent?* | *state* | *year* | *previous* | *constit. convent?* |
| Alabama | 1867 | l | yes | California | 1911 | p | no | Arizona | 1974 | np | no |
| Arkansas1 | 1864 | l | yes | Georgia | 1984 | p | no | Colorado | 1966 | p | no |
| Arkansas2 | 1874 | gv | yes | Idaho | 1935 | p | no | Florida | 1972 | p | no |
| Florida | 1887 | gv | yes | Kentucky | 1968 | p | no | Indiana | 1968 | p | no |
| Georgia | 1896 | l | no | Louisiana | 1976 | p | no | Iowa | 1962 | p | no |
| Illinois | 1848 | l | yes | Maryland | 1952 | p | no | Kansas | 1958 | p | no |
| Indiana | 1851 | gv | yes | Michigan | 1943 | p | no | Maryland | 1976 | np | no |
| Iowa | 1857 | l | yes | Minnesota | 1912 | p | no | Missouri | 1940 | p | no |
| Kentucky | 1850 | gv | yes | Montana | 1935 | p | no | Nebraska | 1962 | np | no |
| Louisiana1 | 1852 | gv | yes | Nebraska | 1913 | p | no | New Mexico | 1989 | p | no |
| Maryland | 1851 | gv | yes | North Dakota | 1910 | p | no | South Dakota | 1981 | np | no |
| Michigan | 1850 | gv | yes | Ohio | 1911 | p | no | Utah | 1967 | np | no |
| Missouri | 1850 | gv | no | Oregon | 1932 | p | no | Wyoming | 1973 | np | no |
| New York | 1847 | gv | yes | South Dakota | 1916 | p | no | | | | |
| North Carolina | 1868 | l | yes | Tennessee | 1952 | p | no | ***Partial merit plan*** | | | |
| Ohio | 1851 | l | yes | Utah | 1952 | p | no | California | 1934 | gv | no |
| Pennsylvania | 1850 | gv | no | Washington | 1912 | p | no | Connecticut | 1987 | gv | no |
| Tennessee | 1853 | l | no | Wisconsin | 1914 | p | no | Delaware | 1989 | gv | no |
| Texas1 | 1866 | gv | yes | Wyoming | 1915 | p | no | Illinois | 1971 | p | yes |
| Texas2 | 1876 | gv | yes | | | | | New York | 1978 | gv | no |
| Virginia | 1850 | l | yes | | | | | Pennsylvania | 1968 | p | yes |
| | | | | | | | | Vermont | 1984 | gv | no |

KEY: gv = appointment by governor
l = appointment by legislature
mp = merit plan appointment
np = nonpartisan election
p = partisan election

**TABLE 3: DATA DESCRIPTION**
**(Mean and Standard Deviation)**

| *Variable* | *Partisan Period (1850-1910)* | *Nonpartisan Period (1910-1960)* | *Merit Plan Period (1960-1990)* | *Source* |
|---|---|---|---|---|
| Constitutional Convention | 0.226 | 0.027 | 0.047 | Thorpe (1909) *Book of the States* (various years) |
| | (.42) | (.16) | (.21) | |
| Majority percentage | 0.699 | 0.760 | 0.682 | ICPSR # 0016 *Book of the States* (various years) |
| | (.15) | (.17) | (.15) | |
| Year joined Union | 1804 | 1832 | 1834 | *Book of the States* (various years) |
| | (19.6) | (39.0) | (41.6) | |
| Democratic control | 0.523 | 0.439 | 0.648 | ICPSR # 0016 *Book of the States* (various years) |
| | (.50) | (.50) | (.48) | |
| Population ('000) | 1593 | 2749 | 4361 | U.S. census |
| | (1488) | (2863) | (4651) | |
| Percent Urban | 27.6 | 46.1 | 65.7 | U.S. census |
| | (21.8) | (19.0) | (14.9) | |
| # Farms per 1000 pop. | 0.07 | 0.06 | 0.02 | U.S. census |
| | (.03) | (.04) | (0.02) | |
| Manuf. empl. per 1000 pop | 66.9 | 123.7 | 78.4 | U.S. census |
| | (59.4) | (131.8) | (36.3) | |
| Number of observations | 199 | 264 | 193 | |

Standard deviations in parentheses. ICPSR is the Inter-University Consortium of Political and Social Research, based in Ann Arbor, MI. Study number 0016 is titled, "The Partisan Division of American State Governments, 1834-1970." Standard deviations are in parentheses.

**TABLE 4: PROBIT REGRESSIONS**
**Dependent variable = 1 if state employed designated selection procedure**

| | *Marginal Effects* | | | | | |
|---|---|---|---|---|---|---|
| | ***Partisan Period (1850-1910)*** | | ***Nonpartisan Period (1910-1960)*** | | ***Merit Plan Period (1960-1990)*** | |
| Constant | -20.47 *** | | -7.891*** | | -4.100** | |
| | (5.55) | | (1.27) | | (2.08) | |
| Constitutional Convention | 0.203* | 0.226* | *excluded* | *excluded* | -0.014 | -0.052 |
| | (.123) | (.127) | | | (.170) | (.155) |
| Majority percentage | -1.185*** | -1.343*** | -0.335** | -0.261* | -0.711** | -0.940*** |
| | (.421) | (.491) | (.161) | (.174) | (.299) | (.359) |
| Year joined Union | 0.011*** | 0.010*** | 0.004*** | 0.0004*** | 0.002** | 0.003*** |
| | (.003) | (.004) | (.001) | (.0001) | (.001) | (.001) |
| Democratic control | 0.292** | 0.266* | -0.119** | 0.035 | -0.086 | -0.109 |
| | (.133) | (.156) | (.048) | (.058) | (.076) | (.074) |
| Population (‘000) | 0.0004*** | 0.0006*** | 0.00001 | -0.00001 | 0.00002* | 0.00001 |
| | (.0001) | (.0001) | (.00001) | (.00001) | (.00001) | (.00001) |
| Percent Urban | 0.017* | 0.008 | -0.002 | -0.009*** | 0.007** | 0.006** |
| | (.009) | (.010) | (.002) | (.003) | (.003) | (.003) |
| # Farms per 1000 pop. | 7.005** | 4.933 | -1.990 | -4.614*** | -0.505 | -7.466** |
| | (2.83) | (3.10) | (1.25) | (1.37) | (2.73) | (3.25) |
| Manuf. empl. per 1000 pop | -0.006 | 0.001 | -0.00002 | -0.0001 | -0.002 | -0.004*** |
| | (.004) | (.005) | (.0002) | (.0002) | (.001) | (.001) |
| Northeast | | -20.03*** | | | | -5.573** |
| | | (6.99) | | *excluded* | | (2.32) |
| Midwest | | -18.84*** | | 0.181*** | | -5.373** |
| | | (6.92) | | (.058) | | (2.37) |
| South | | -19.12*** | | -0.319*** | | -5.522** |
| | | (6.84) | | (.082) | | (2.34) |
| West | | *no Western states* | | *excluded* | | -5.875** (2.40) |

| | | | | | | |
|---|---|---|---|---|---|---|
| % correct | 82.9 | 86.9 | 79.9 | 84.1 | 79.3 | 75.1 |
| Log-likhood. | -66.86 | -59.50 | -96.19 | -98.99 | -89.27 | -81.11 |
| #obs.(=1) | 199 (99) | 199 (99) | 264 (57) | 264 (57) | 193 (55) | 193 (55) |

Estimated marginal effects are listed. Standard errors in parentheses. *** = significant at less than one percent; ** = significant at less than 5 percent, * =significant at less than 10 percent.

**FIGURE 1: JUDICIAL SELECTION AND RETENTION PROCEDURES BY DECADE (1790-1910)**

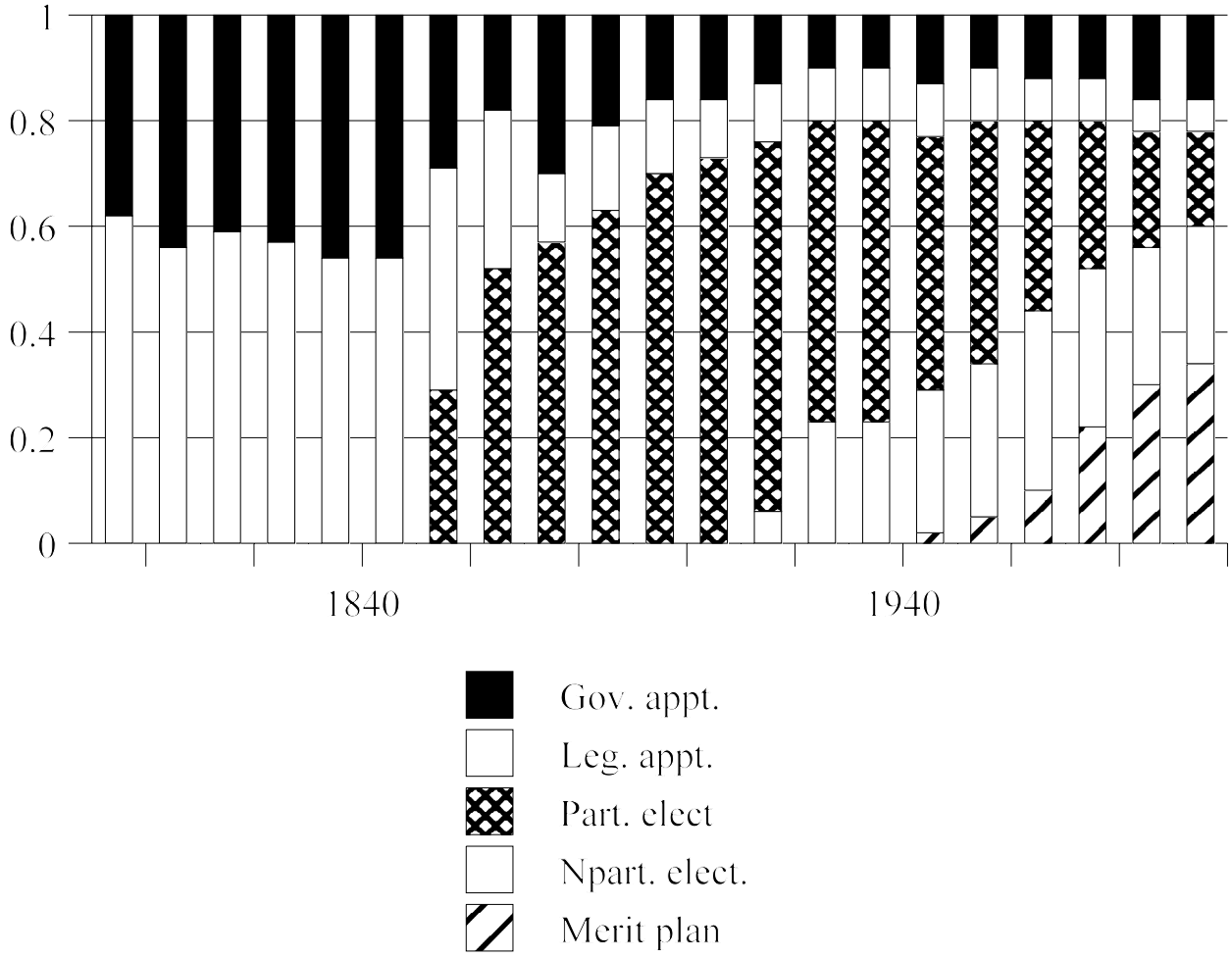

**FIGURE 2: JUDICIAL SELECTION AND RETENTION PROCEDURES BY PERIOD**

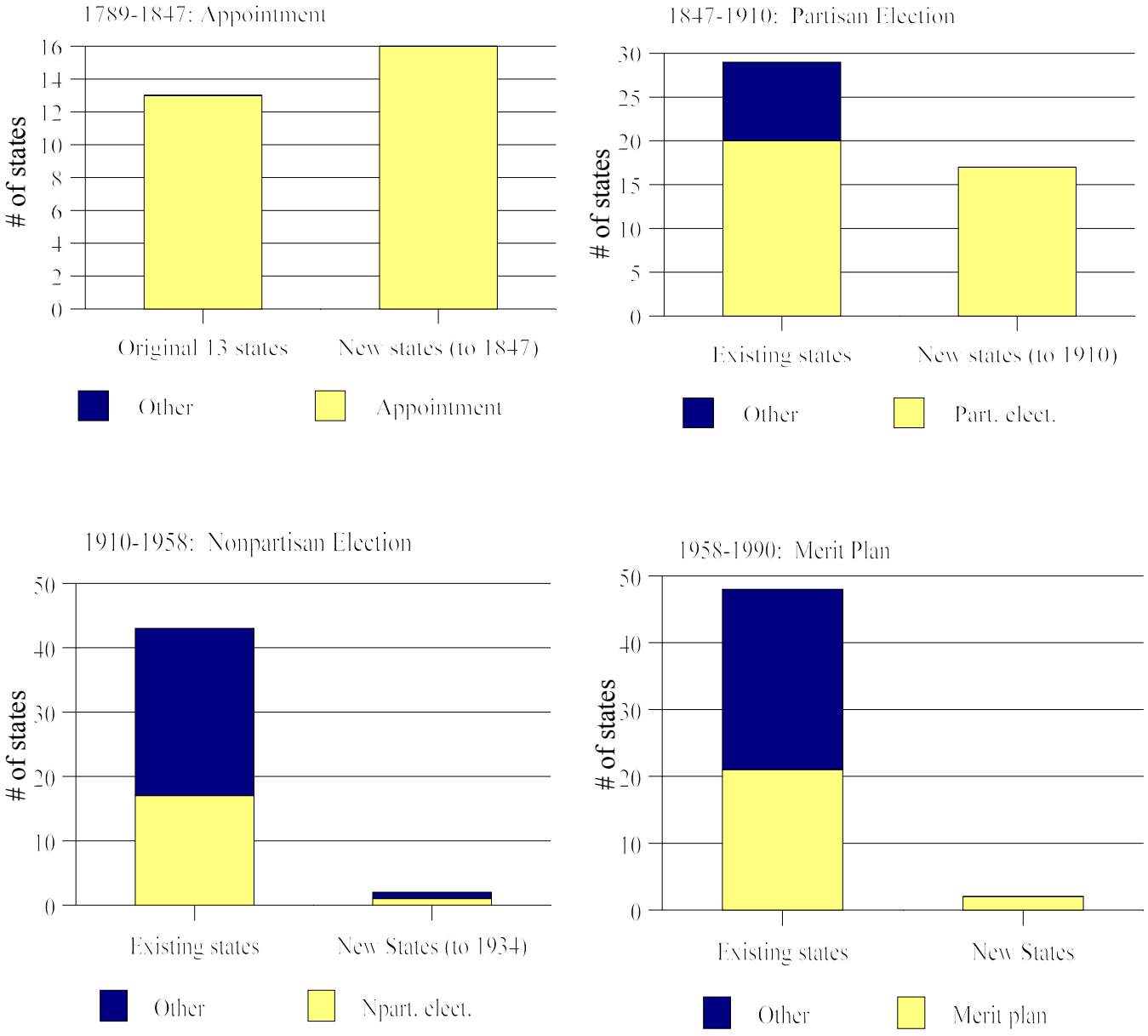

**FIGURE 3: JUDICIAL SELECTION AND RETENTION PROCEDURES IN EXISTINGSTATES BY PERIOD**

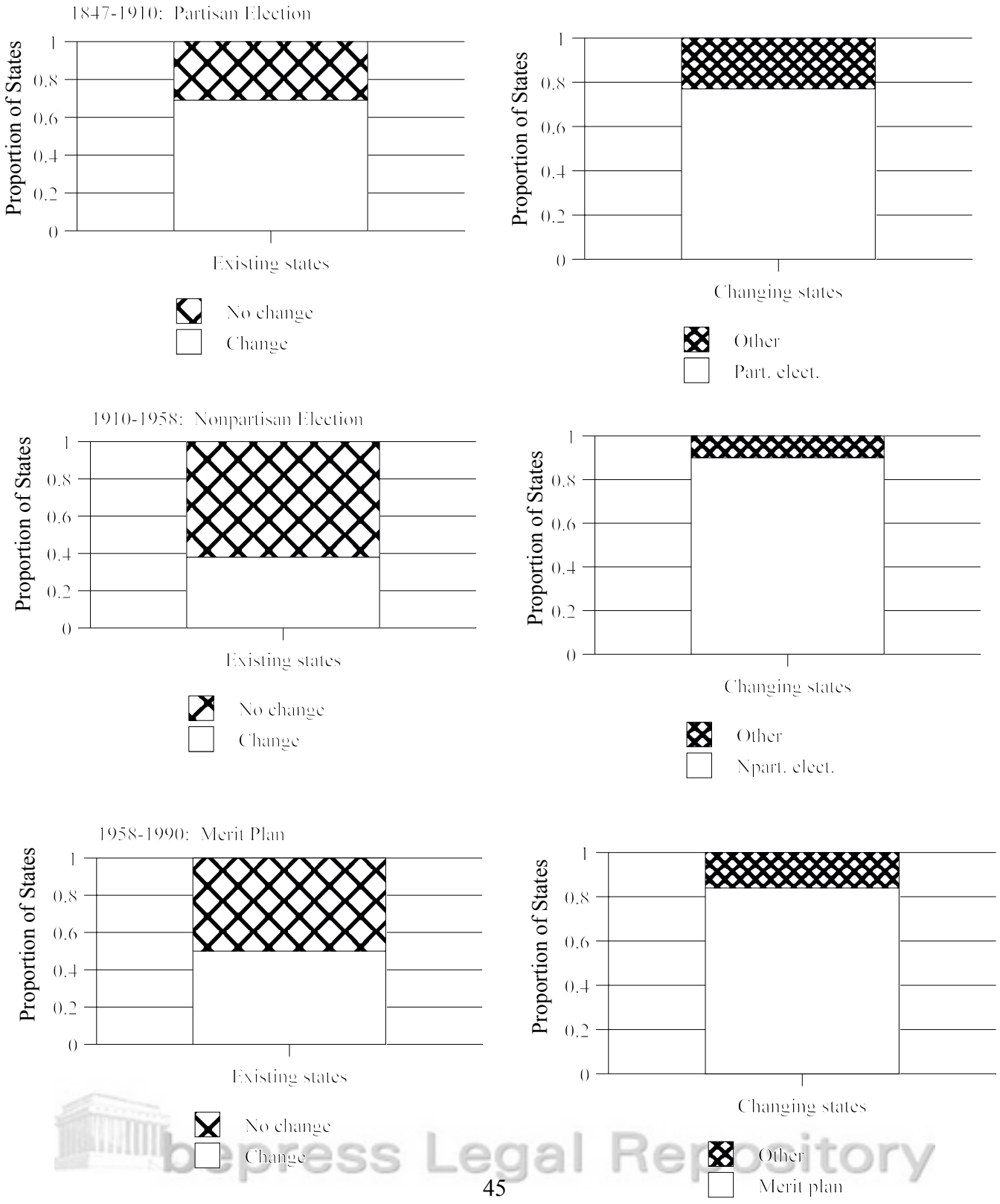

**FIGURE 4: STATES WHO CHANGED PROCEDURES (By Period).**

4a: *States in Existence as of 1847 who Adopted Partisan Judicial Elections (Year and order of change).*

**FIGURE 4: STATES WHO CHANGED PROCEDURES (By Period) (cont).**

4b: *States in Existence as of 1910 who Adopted Nonpartisan Judicial Elections (Year and order of change).*

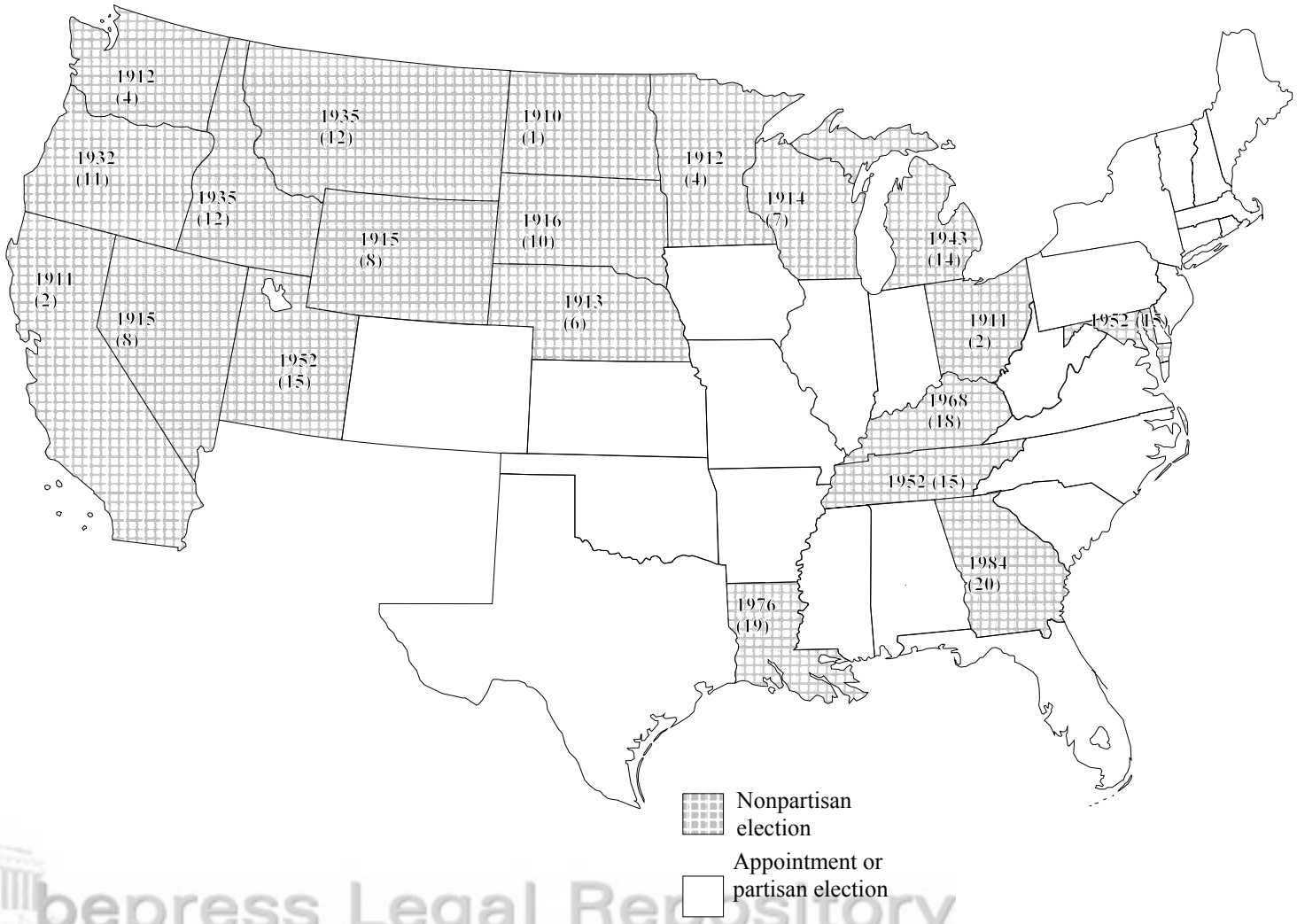

**FIGURE 4: STATES WHO CHANGED PROCEDURES (By Period) (cont.)**

4c: *States in Existence as of 1940 who Adopted the Merit Plan (Year and order of change).*